No. 19,325

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL BAKING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REVIEW AND FOR DECREE SETTING ASIDE OR MODIFYING ORDER OF THE FEDERAL TRADE COMMISSION

PETITION FOR LIMITED REHEARING EN BANC

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STATEMENT OF REASONS FOR GRANTING PETITION

This petition is addressed to the opinion of this Court, dated September 14, 1966, affirming a Federal Trade Commission Cease and Desist Order issued under Section 5 of the Federal Trade Commission Act. Grounds for the petition are (1) that the Court has transgressed the important principle of administrative law that agency orders can only be affirmed on the grounds relied upon by the agency, and (2) that the September 14 opinion is flatly contrary to applicable Supreme Court precedent defining the scope of the Federal Trade Commission Act. Both questions are of substantial public importance.

1. This Court Is Without Authority to Affirm an Agency Decision on Grounds Other Than Those Relied Upon by the Agency.

Section 5 of the Federal Trade Commission Act provides that "unfair methods of competition in commerce are hereby declared unlawful." 15 U.S.C. § 45 (1964). "Commerce" as defined in Section 4 of the Act in relevant part "means commerce among the several states or with foreign nations . . . ." 15 U.S.C. § 44 (1964).

The complaint in this proceeding alleged a conspiracy among some sixty-three persons and firms in and around Seattle, Washington. The Commission held that the alleged local Seattle conspiracy was "in commerce" because of the multistate character of certain of the respondent companies such as Continental. The Court's opinion of September 14 expressly disavowed reliance upon this theory of jurisdiction, however, and instead held that certain sales made by a few of the respondents to distributors in Seattle who in turn ship bread to Alaska were sufficient to bring the alleged Seattle conspiracy within the terms of the Act.

The Court's entire analysis and holding appears in one paragraph of its decision:

> "The Alaskan sales were not wholly unrelated to the activities which the FTC seeks to prevent. The prices received for these sales, sales which were clearly made 'in commerce', were determined in the same manner as sales made in the State of Washington. While it may be that the petitioners intended that their activities affect only those sales made within the State of Washington, the effect was otherwise."

In its turn, the Commission had expressly disavowed reliance upon these Alaska sales. The Commission had held, referring to the Alaska sales, that

> ". . . this case involves a much larger problem. We think it not only important *but necessary* that we deal with the question of whether these great interstate firms can claim immunity from the statutory prohibition against price fixing in regard to the remaining 99 per cent of the transactions involved, those that took place within the borders of the State of Washington." [Emphasis added.] (R. V. II, p. 821).

In accordance with this finding of necessity the Commission admitted that its record did not support the broad order it was issuing and went on to take official notice of facts not in the record. The Commission never said whether this unusual action was "necessary" because an Alaska finding would lack any evidentiary support,* or because the complaint did not contain due notice of such a charge since it

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* The Commission alleged a sixty-three member conspiracy which obviously had no interest in the minuscule sales to the Alaska shippers. Not only was there no evidence offered of any collusion on those sales but, in spite of the assumptions of fact made in the Court's dispositive paragraph, there is no evidence whatever of what Continental's prices were to shippers to Alaska, nor any evidence of Buchan's prices, nor Hansen's, nor when and if they changed, nor whether any discounts were quoted, etc., and there is, moreover, no evidence whatever that these prices were affected by the alleged Seattle conspiracy. (See Petitioner Continental's Reply Brief, pp. 4-5).

contained no mention of anything respecting Alaska, or because standard rules of law prohibit a finding of a four man conspiracy on a charge of a sixty-three man conspiracy, or because a narrow finding on Alaska would not in its judgment support the broad order that was issued. Whatever the reason, the fact is the Commission's order does not purport to rest on the sales to the Alaska trade, and this is the only basis the Court rested its affirmance on.

The legal principle violated by this Court's affirmance of an agency order on grounds different than those relied upon by the agency is stated in the leading case of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). The holding of the Supreme Court in this case is stated in one sentence: "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which the action can be sustained." 318 U.S. at 95.

The holding of *Chenery* as applied to the case at hand is simply that the agency's order cannot be affirmed absent an affirmance by this Court of the Commission finding that the method of competition alleged in Seattle was "in commerce" because of the multi-state character of some of the respondents. For the reasons already argued to the Court, and as to which the September 14 decision contained no opinion, we submit that such a finding is legally impermissible.

2. Section 5 of the Federal Trade Commission Act Requires a Showing of Unfair Acts or Practices Which Are Actually in Interstate Commerce.

The second legal error in the September 14 opinion also stems from the Court's reliance upon the Alaska sales for jurisdiction. As noted, the Act provides that "unfair methods of competition in commerce" are unlawful. The Supreme Court has explicitly held that this language means what it says; *i.e.*, that "un-

fair methods of competition in [interstate] commerce" does not mean "unfair methods of competition in any way affecting interstate commerce." *FTC* v. *Bunte Bros., Inc.,* 312 U.S. 349, 355 (1941).

The September 14 opinion, in the paragraph quoted above, holds that the alleged Seattle conspiracy violated Section 5 because it "affected" prices on sales to dealers for shipment to Alaska made by a few of the sixty-three alleged co-conspirators. As such, the decision is squarely in conflict with the Supreme Court's holding in *FTC* v. *Bunte Bros., Inc., supra,* which is the leading case on the scope of Section 5, and a case not even cited in the September 14 opinion.

In *Bunte Bros., Inc.*, the Commission tried to prohibit intrastate activities of a firm on the theory that they were in commerce because they "affected" commerce. The analysis of the Supreme Court is fully stated in two brief excerpts from its opinion:

> "While one may not end with the words of a disputed statute, one certainly begins there. 'Unfair methods of competition in commerce' are the concern of § 5, and the Commission is 'directed to prevent persons . . . from using unfair methods of competition in commerce . . .' The 'commerce' in which these methods are barred is interstate commerce." 312 U.S. at 350-51.
>
> ". . . we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished." *Id.* at 355.

Bunte Bros., Inc., remains the definitive statement of the scope of Section 5. It has never been overruled, superseded, or limited by any subsequent decision.

CONCLUSION

The dispositive paragraph of the Court's decision thus not only articulates a legal theory expressly rejected by the Supreme Court, but also affirms, contrary to Supreme Court command, on a basis upon which the Commission was either unable or unwilling to rely.

The Court's opinion is of substantial public importance as it would expand significantly the hitherto established reach of Section 5 of the Federal Trade Commission Act. It is, moreover, of significant concern to Continental Baking Company for, alone among its multistate competitors, Continental would be subject to a broad Commission order. (Even those few named in the order have since been acquired by others.) It is no answer to say the order would only require adherence to the law. It would do much more. It would subject Continental in perpetuity to recurrent Commission compliance demands as to which there is no effective relief. In addition, if the Court should sign the order submitted by Commission counsel, Continental would unlawfully be continually exposed to proceedings for contempt of this Court.

We respectfully submit that the legal errors underlying the September 14 opinion require reconsideration by the full Court.

Respectfully submitted,

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Certificate

I certify that this Petition for Limited Rehearing En Banc is well-founded and not interposed for delay.

James V. Siena